FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR APPELLANT

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Argument

Appellee's brief[1] is based on the premise that if the Commission believes that promotional advertising by electric utilities may have consequences which run counter to policies which the Commission is authorized to foster, the Commission may prohibit the advertising (Com. Br. 20-30).[2] Of course that is wholly con-

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[1] "Com. Br." refers to the Brief for Appellee filed by the Public Service Commission of the State of New York ("Commission"); "App. Br." refers to the Brief for Appellant filed by Central Hudson Gas & Electric Corporation ("Central Hudson"); "J. S. App." refers to the Appendix to Jurisdictional Statement, a separate bound volume filed with the Jurisdictional Statement.

[2] Appellee also argues "that promotion of electric usage is contrary to the express national . . . policy of energy conservation" (Com. Br. 9)—an astonishing claim in view of the fact that the pertinent federal legislation explicitly recognizes the legitimacy of electric utility promotional advertising (App. Br. 24). See 16 U. S. C. §§ 2623(b)(5) and 2625(h).

trary to the spirit and scope of the First Amendment as declared by this Court in many decisions. Even in the absence of the First Amendment, official limitations on conduct must be reasonably related to a permissible purpose.

But when the prohibited conduct is speech, the constitutional validity of the limitation depends on much more than a rational or even an "important" purpose. Appellee's contention, that this Court has never overridden "an important state objective" while invalidating a commercial speech ban (Com. Br. 11), blandly disregards the contrary decisions of this Court (App. Br. 25).[3]

This is not the first time that officials have asserted authority to identify "good" and "bad" speech and suppress the latter sort. The claim has been the dominant theme of appellee's case throughout this proceeding. In our main brief we have endeavored to expose the frailties and fallacies of that case, and we would not now burden the Court with even a brief reply but for four matters newly raised in appellee's brief which, we believe, require response.

1. *"Promotional" vs. "Informational" Advertising.* Appellee, for the first time in this litigation, seeks to draw a distinction between "promotional" and "informational" advertising, and states that the Commission's order does not prohibit the latter

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[3] *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 425 U. S. 748, 769 ("professional standards" justification previously held sufficient to support advertising bans against due process and equal protection challenges held insufficient to override First Amendment challenge); *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 94-97 (promotion of racially integrated housing an important goal but insufficient to justify ban on real estate "for sale" signs); *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 368-79 (adverse effect on professionalism, misleading possibilities, impairment of administration of justice, and decline in quality of legal services, all considered and rejected as justification for ban on lawyers' advertising). In all these cases the degree and imminence of the asserted danger was questioned, but the possibility of the bad consequences was recognized and held insufficient to justify the suppression of commercial speech.

type (Com. Br. 13-14). The avowed purpose of so doing is to analogize the present case to *Ohralik v. State Bar Association*, 436 U. S. 447, in which a ban on "ambulance-chasing" was upheld, and differentiate it from *Bates v. State Bar of Arizona*, 433 U. S. 350, in which the banning of price advertising by attorneys was invalidated. The effort is ineffectual, inasmuch as it rests on the absurd premise that the lawyer-appellants in the *Bates* case were not seeking to induce the readers of their advertisement to become clients—i.e., not "promoting" their own legal services—but that they "simply provided price information so a potential client could judge whether to avail himself" of their services.[4]

In its context, however, appellee's emphasis on the promotional-informational distinction appears also intended to convey the impression that the Commission's order does not prohibit Central Hudson from publishing advertisements which provide information about such devices as heat pumps, so long as the advertisements do not in terms recommend their use.[5] While we think it plain that such a limitation on the scope of the challenged order would in no way remove or mitigate its constitutional defects, we think it equally clear that neither the

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[4] See the advertisement in question (433 U. S. at 385) and the statement in Mr. Justice Blackmun's opinion of the Court (433 U. S. at 354) that the purpose of the advertisement was "to generate the necessary flow of business, that is 'to attract clients.' "

[5] This implication is strengthened by the statement (Com. Br. 14 note 7) that Central Hudson is not "barred from informational advertising that advises the public that the utility is available to provide information on electric costs and equipment," read in conjunction with the later statement (Com. Br. 26 note 20) that " . . . utilities remain free to provide advice to customers if they request it. The Commission's restriction relates only to direct promotional advertising by the utility itself." Since the "advice" given on request may thus include the recommendation of heat pumps or other electrical usage, advertising the availability of such advice may, and would be intended to, cause an increase in electrical usage, which is the very thing that respondent elsewhere declares to be what the order is intended to prevent.

Commission's opinions supporting the order, nor the balance of appellee's brief, is consonant with such an interpretation.[6]

In conclusion on this point, it should be noted that the Commission's use of and emphasis on the promotional-informational distinction makes a shambles of its argument in defense of the order against the charge of vagueness (Com. Br. 34-35; App. Br. 39). "Promotional" and "informational" are not words of art. There is no line but rather a large over-lapping area between them; it is hard to conceive of promotional advertising which is not, to some extent, informative, and informational advertising often can be regarded as promotional.

Central Hudson has engaged in an active program of supplying information to its customers about methods of conservation, but even this program has been questioned under the Commission's ban. In Central Hudson's most recent rate case the question arose whether Central Hudson's publication in 1978 and 1979 of information about heat pumps was "promotional" or "informational". *Central Hudson Gas & Electric Corp. Rates,* Cases 27461 and 27462, —— NYPSC —— (October 24, 1979).[7] In that proceeding, the Commission's Administrative

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[6] The definition of promotional advertising in the Commission's opinion (J. S. App. 35a) is "advertising intended to stimulate the purchase of utility services", and the description of informational advertising (J. S. App. 43a) includes no mention of heat pumps or other electrically energized devices, or of any information which might be expected to increase the use of electricity. Appellee's brief, except in the portion under discussion, emphasizes the purpose of the order to ban any advertising which would lead to an increase in electrical usage (Com. Br. 9, 14-15, and 21-30).

[7] Relevant excerpts from the Commission's decision are appended hereto as Appendix A.

We are puzzled by appellee's statement (Com. Br. 13 note 6) that: "To our knowledge no utility has attempted an informational advertising campaign although it would not be prohibited by the Commission's order." In the fall of 1978, Central Hudson sponsored a "SavEnergy Fair" (open to the public and attended by rep-

[*footnote 7 continues on next page*]

Law Judge had written (with respect to the challenged literature): "As far as determining whether the heat pump advertisement and other similar advertisements are promotional or informational on their face, it is almost an impossible task. However, since Central Hudson distributes such information only upon request, it should be considered informational."[8]

"Broad prophylactic rules in the area of free speech are suspect. Precision of regulation must be the touchstone. . . ." *NAACP* v. *Button*, 371 U. S. 415, 438, quoted with approval in *Village of Schaumburg* v. *Citizens for a Better Environment*, —— U. S. ——, 48 L. W. 4162, 4166 (Feb. 20, 1980).

2. *Electric spaceheating.* Partly in response to the *amicus* brief filed by the Long Island Lighting Company (LILCO), appellee is at pains to deny "that the Commission is somehow attempting to ban electric space heating by stifling information and inhibiting consumer choices" (Com. Br. 17-18). Indeed, appellee goes further by declaring (Com. Br. 18 note 11) that: "The Commission has never taken the position that electric space

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resentatives of the Commission), at which appellant distributed a pamphlet explaining various means of saving energy in the home (e.g., insulation, heating and cooling systems operation, refrigerator use, etc.) including heat pumps, which were described as operating "as economically as any other system" and as providing "operational advantages unmatched by any other system." In the spring of 1979 Central Hudson published in local newspapers an advertisement of its new "Home Advisory Service" (established to help the homeowner "substantially reduce energy usage"), in which the heat pump was described as "increasingly popular, because it both heats and cools the home and uses about half the electricity a conventional electric installation uses for heating." In the course of the rate proceeding cited above, an intervenor contested Central Hudson's proposed advertising expense allowance, in part by criticizing these favorable mentions of heat pumps.

[8] *Central Hudson Gas & Electric Corp. Rates, supra,* and Recommended Decision by Administrative Law Judge Walter T. Moynihan (July 23, 1979) at pp. 18-19. Relevant excerpts from the Recommended Decision are appended hereto as Appendix B.

heating should be discouraged. Its sole concern is the promotion of electric usage by electric utilities."[9]

This comment is bemusing, as it is hard to see how the prohibition of advertising which promotes the use of electricity can be anything but discouraging to the use of electricity for space heating or any other purpose. Obviously, the Commission is not concerned about the promotion itself, but about its putative consequences.

More importantly, however, the Commission's disavowal of opposition to space heating starkly reveals that its order suppresses speech about an activity even though there is no "sufficient basis" to restrict that activity. The Commission's case thus rests upon the proposition—obviously untenable—that speech can be prohibited upon a lesser showing than would be required to restrict the conduct which the speech promotes.[10]

3. *New York State.* In attempting to justify its prohibition despite the fact that the federal authorities and other states do not perceive the "energy crisis" as requiring such a prohibition, the Commission argues (Com. Br. 24-25 and 38 note 31) that New York State faces a unique degree of dependence on oil for electric

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[9] As stated in our main brief, Central Hudson does not presently intend to promote electric *resistance* heating. This is due, however, to factors which may well prove temporary, and is irrelevant to our position with respect to the Commission's order which, we contend, is unconstitutional both facially and as applied, whether to electric resistance heating or to any other lawful electrical usage.

[10] The statement in the same footnote (Com. Br. 18 note 11) that the Commission "has ample statutory authority to ban electric space heating . . . but has chosen not to do so because a sufficient basis for such an action has not been shown" is oddly put. The Commission's decision-making is not supposed to be a matter of "choice"; if no basis exists for a prohibition, the Commission has no authority to impose it.

generation. However, New York State's dependence is not unique, and in any event this point is irrelevant.[11]

In the first place, the Commission did not rest its decision on the degree of New York State's dependence on foreign oil; it relied on the theory that promotion of electric usage would aggravate the *nation's* dependence on foreign oil.[12] In gauging the importance of the asserted aggravation, clearly the pertinent Congressional legislation is highly relevant, as is the action (or inaction) in other states.

In the second place, the factual support cited by appellee is unimpressive. The Commission refers (Com. Br. 24 note 18) to the *Draft Report, New York State Energy Master Plan,* New York State Energy Office, August 1979, p. 339, which estimates that oil accounted for 44.1% of the electricity generated in New York State in 1978. The Commission contrasts this 44.1% with national average of 16.1%. But other states in the country rely on oil for larger percentages of the electricity generated than New York, yet these states have not seen fit to adopt a prohibition on electric promotional advertising. According to the *EIA Report on Preliminary Power Production, Fuel Consumption and Installed Capacity Data for November 1979* (DOE/EIA/0005/11[79]) prepared by the Energy Information Agency of the Federal Department of Energy, during the month of November 1979, the states of Massachusetts, Connecticut, New Hampshire, Rhode Island, New Jersey, Virginia, Mississippi, Hawaii, Florida and California generated a greater proportion of electricity by use of oil than New York State.

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[11] It should be noted that appellee's argument, even if assumed factually valid, has no bearing on the policy chiefly relied on by appellee to support the ban—i.e., the policy favoring a marginal cost rate structure (Com. Br. 26-29). That matter is common to all jurisdictions engaged in rate regulation (App. Br. 26-30), as evidenced by Title I of the Public Utility Regulatory Policies Act of 1978, P. L. 95-617, 16 U. S. C. §§ 2611 *et seq.*

[12] J. S. App. 37a, 58a, 85a. The New York Court of Appeals referred to "state concern" (J. S. App. 14a) only in the context of the "energy crisis" generally (J. S. App. 13a-14a), and with no reference to factors peculiar to New York State.

Thirdly, the Commission's reliance on comparisons of oil usage among states and of percentages of oil from foreign sources demonstrates an inconsistent position. While the Commission perceives electric usage in terms of marginal or incremental considerations (see Com. Br. 27-28) it fails to perceive that *any* increased consumption of oil, whether for electric generation or as a direct fuel in a home oil furnace, will require increased dependence on foreign sources, since United States consumption of all petroleum products exceeds domestic production and the marginal or incremental consumption must come from foreign sources. Thus, increased oil-fired generation in a state whose percentage of electric generation by oil is identical to the national average, 16.1%, will increase dependence on foreign oil just as much as such increased consumption in New York State where the percentage is 44.1%.

Likewise, if one is concerned about reducing demand for foreign oil, the fact that the percentage of home heating oil supplied from foreign sources is lower than the percentage of oil for electric generation (Com. Br. 38 note 31) is irrelevant.[13] The marginal or incremental consumption of home heating oil must be supplied from foreign sources as long as our consumption exceeds domestic production.

In short, as far as the energy situation is concerned, the Constitution should be applied in line with Justice Cardozo's observation that it "was framed upon the theory that the peoples of the several states must sink or swim together. . . ." *Baldwin* v. *Seelig*, 294 U. S. 511, 523. Neither in the record of the

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[13] There is substantial question whether the assertion set forth at Com. Br. p. 38 note 31 can be supported. While the *Draft Report, New York State Energy Master Plan*, New York State Energy Office, August 1979, at Fig. III-10 would indicate that a higher percentage of oil for electric generation in New York State comes from foreign sources than for home heating, in the discussion of New York State prices for petroleum products, that report (Section V-E, p. 15) indicates that foreign sources account for about 90% of all heating oils, including home heating oil and residual fuel oil used for electric generation.

present case, nor available for judicial notice, is there any evidence of a shortage of oil for the generation of electricity in New York or in the nation as a whole. Neither in Congress nor in the other states is there any support for the Commission's conclusion that a prohibition on the promotion of electrical usage makes a contribution to the energy situation sufficient to justify the prohibition of speech.

4. *Prior Restraint.* At various points throughout its brief, appellee has referred to the Commission's power to interpret, or allow exemptions from, its order. The purpose of these observations, obviously, is to suggest that appellant, instead of attacking the order's breadth, should come to the Commission and ask permission to put out a particular advertisement (Com. Br. 15, last sentence of text; 17, "utilities may ask the Commission for exemptions from its advertising ban"; 22-23; 35, "Central Hudson has the opportunity here to have the Commission consider whether its proposed conduct comes within the prohibition of promotional advertising.")

The short answer to all this is that both the Commission's opinions and its brief are categorical in maintaining that no such "exemptions" will be granted if the advertisement promotes increased use of electricity, even if it would save energy in general and oil in particular—in other words that promotion of any additional use of electricity will not be tolerated even if it replaces a less efficient and more oil-dependent use. In the face of this attitude, application to the Commission would be futile.

But the vice of the Commission's assertion lies deeper, for it plainly constitutes prior restraint.[14] Such restraint may be

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[14] By prior restraint we mean the prohibition of publication without advance permission, so that the publication of unobjectionable material may be punished because prior permission was not obtained.

permissible in commercial speech cases to prevent fraud or deception.[15] *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 425 U. S. 748, 771 note 24. But no such factor is involved here, for whether an advertisement is or is not truthful has nothing to do with the criteria enunciated by the Commission. Indeed, the vagueness of those criteria (*supra,* pp. 2-5)[16] renders the Commission's exemption-granting proposition especially vulnerable to the long-established rule against prior restraints. *Near* v. *Minnesota,* 283 U. S. 697; *Freedman* v. *Maryland,* 380 U. S. 51.

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[15] In this regard, the prior restraint established under the Commission's order can be contrasted with the regulation of securities under the Securities Act of 1933, as amended, where a standard to prevent deception and fraud is clearly set forth. See 15 U. S. C. § 77q.

[16] The uncertainty of these criteria may also be seen in the Commission's explicit approval of utility advertising "extolling the desirability of the [utility company's] area as a location for job-creating industry" (J. S. App. 43a note 1). For such advertising, the Commission happily casts to the winds its concern to prevent the increased use of electricity, saying (*Id.*): "Whatever its possible effects on utility rates, its benefits for the economy of New York State clearly makes such advertising a fully acceptable activity by utility companies." Thus, "boosting" New York State is made a sufficient value to override both conservation and marginal cost pricing, but First Amendment values are deemed inadequate.

Conclusion

For the reasons set forth above and in the Brief for Appellant, the relief sought by appellant should be granted.

Respectfully submitted,

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APPENDICES

Appendix A

Excerpts from Commission Opinion and Order, *Central Hudson Gas & Electric Corp. Rates,* Cases 27461 and 27462, October 24, 1979

* * *

Advertising

The company proposed an advertising expense allowance equal to 0.09% of its proposed operating revenues, which is near the upper limit of the 0.04% to 0.1% range authorized in our *Statement of Policy on Advertising,* on the grounds that the company is relatively small and that effective use of mass media is relatively expensive in its territory. MHNO said the allowance should be restricted to 0.04% as a sanction against the company's allegedly improper advertising. Based on the company's proposed total revenue allowance, 0.09% and 0.04% would be roughly $217,000 and $101,000, respectively; under staff's proposal of about $240 million in total revenues, the respective figures would be about $205,000 and $96,000. The Judge recommends an allowance of 0.09%, and MHNO excepts.

The Judge relies on the cost considerations cited by the company as justification for allowing a percentage near the maximum. * * * He recommends that staff advise the Commission whether the company should continue to distribute an energy conservation pamphlet that includes favorable statements about heat pumps, in view of MHNO's objection that the company has failed to analyze how its load factor might be affected by widespread use of heat pumps. As long as the material is being distributed, he says, "it is almost . . . impossible" to determine whether the material is promotional rather than informational; but he decides to accept it as informational because the company provides it only on request. Otherwise, he generally rejects MHNO's substantive objections to the company's advertising.

* * * With regard to heat pumps, we are directing staff to review the challenged literature and the possibility that it requires modification.

Excerpts from Commission Opinion and Order,
Central Hudson Gas & Electric Corp. Rates,
Cases 27461 and 27462, October 24, 1979

* * *

The Commission orders

* * *

5. Staff shall review the company's mass-distributed material concerning heat pumps, for the purpose of determining and reporting to the Commission whether the material necessitates action by staff or the Commission.

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Appendix B

Excerpts from Recommended Decision by Administrative Law Judge Walter T. Moynihan, *Central Hudson Gas & Electric Corp. Rates*, Cases 27461 and 27462, July 23, 1979

* * *

Advertising Expenses

Central Hudson's projected advertising expenses are set forth in the table below. Based on the company's proposed rates the advertising expenses equate to about .09% of the operating revenues. Staff reviewed the company's advertising expenses and found them reasonable.

ADVERTISING EXPENSES

12 Months Ended October 31, 1980

Informational Advertising	$154,000
Professional Services	24,000
Institutional Advertising	19,000
In-House Labor	20,000
TOTAL	$217,000

Central Hudson noted that it is a relatively small utility and it should receive an advertising allowance near the higher end of the range of .04% to .1% of operating revenues. The company argued that advertising costs per thousand are higher in the mid-Hudson region than in larger metropolitan areas. For example, the area is served by four daily and 30-odd weekly papers; by 15 radio stations—no one of which dominates any market area; and by New York City and Albany based television stations. Furthermore, the company stated that most of its advertising is devoted to safety, conservation, customer services, and information disseminated pursuant to Commission directive.

* * *

In addition, MHNO would limit advertising expenses to .04% of operating revenues as a remedial step to dissuade the

Excerpts from Recommended Decision by Administrative Law Judge Walter T. Moynihan, Central Hudson Gas & Electric Corp. Rates, *Cases 27461 and 27462, July 23, 1979*

company from placing advertisements which MHNO believes are in violation of the Commission guidelines. For example, (1) Central Hudson will supply individuals with a pamphlet on electric heat pumps which MHNO claims is unrealistically optimistic and should not be distributed, (2) the company ran newspaper advertisements stating the benefits of burning 2% sulfur oil instead of 1% in the Danskammer generators; and (3) the company distributed bill inserts setting forth the local property taxes paid by Central Hudson, which MHNO claims was an attempt to counter the growing interest in municipal power.

It is recommended that Central Hudson's claimed advertising expenses be allowed in full because they fall within the guidelines established by the Commission.[1] * * * As far as determining whether the heat pump advertisement and other similar advertisements are promotional or informational on their face, it is almost an impossible task. However, since Central Hudson distributes such information only upon request, it should be considered informational. Since the Commission's policy allows utilities to explain and justify their actions, it appears reasonable to allow advertisements such as those on the sulfur content of oil and the amount of taxes paid by the utility. Thus, these costs should be allowed.

As noted above, MHNO requested that Central Hudson be banned from distributing its pamphlet on heat pumps since MHNO believes that the pamphlet is overly optimistic and that increased penetration rates of heat pumps, backed up by resistance heat, could lead to a serious decline in a utility's load factor.

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[1] Statement of policy on Advertising and Promotional Practices of Public Utilities issued February 25, 1977.

Excerpts from Recommended Decision by Administrative Law Judge Walter T. Moynihan, Central Hudson Gas & Electric Corp. Rates, *Cases 27461 and 27462, July 23, 1979*

Central Hudson responded by stating that without electric heating, about 9% of the heating market, it would be a summer peaking company to a significant extent. At present, the company's summer and winter peaks are roughly equal and it will retain its balanced peaks to a large part because heat pump penetration is expected to increase to about 30% of the heating market over the next fifteen years.

Since this issue is extraneous to the rate case, it should not be decided here, especially in view of the fragments of evidence presented. Instead Staff should evaluate the contents of the pamphlet and report its findings with appropriate recommendations to the Commission.